

Before the
Administrative Hearing Commission
State of Missouri



COVENANT CARE SERVICES, LLC,

Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES,
MO HEALTHNET DIVISION

Respondent.

No. 11-0709 SP

DECISION

Covenant Care Services, LLC (“Covenant”) was paid \$12,770.88 by the Department of Social Services, MO HealthNet Division (“the Division”) for personal care services provided to its client, D.S., by its employee, Tania Miller (“Miller”), that were ineligible because Miller and D.S. are family members. Because Covenant took every reasonable measure to ensure compliance with the law and regulations governing personal care services and did not intentionally submit bills for ineligible services, Covenant is not subject to any penalty.

Procedure

On April 25, 2011, Covenant filed a complaint challenging the Division’s decision to seek recoupment of an overpayment of \$12,770.88 and requesting a stay of imposition of the sanction. On May 20, 2011, this Commission issued its order granting Covenant’s motion for stay. Covenant waived the 300-day deadline for deciding Medicaid overpayment cases found in

§ 208.221.¹ After several continuances and extensions were requested and agreed to by both parties, this Commission convened a hearing on the Complaint on November 21, 2011. David W. Newell represented Covenant. Assistant Attorneys General Matthew Laudano and Shannon T. Kempf represented the Division. The matter became ready for our decision on March 20, 2012, the date the last written argument was filed.

Findings of Fact

1. Covenant is a Missouri Medicaid provider and is enrolled in the Missouri Title XIX (“Medicaid”) personal care program. This program provides in-home care for participants who are eligible to receive such services.

2. Rebecca Reagan, RN (“Reagan”) is the Director of Covenant and an owner.

3. The Division² is an agency of the State of Missouri charged with administering Missouri’s Medicaid program. The Division has authority for determining Medicaid reimbursement, authority to determine provider participation in Medicaid, and authority to administer sanctions for violation of the rules governing the Medicaid program.³

4. Covenant developed a Policy and Procedure Manual/Employee Handbook (“the Handbook”) based on the requirements of 19 CSR 15-7.021(18). The Handbook includes the statement “No employee will be allowed to care for a family member” in the section on Personal Care Services. All employees receive a copy of the Handbook and are required to read and review it during new employee orientation and annually during the term of their employment. Each time they receive a copy of the Handbook, employees are required to sign a statement

¹ RSMo 2000. Statutory references are to RSMo Supp. 2012, unless otherwise indicated.

² The MO HealthNet Division is the successor agency to the Division of Medical Services.

³ Sections 208.152, 208.153, and 208.201, 13 CSR 70-3.020, 13 CSR 70-3.030, 13 CSR 70-3.130. All references to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

acknowledging that they have received the Handbook and that they “understand and agree to abide by the policies and information”⁴ contained in the Handbook.

5. On April 8, 2008, Miller was hired by Covenant as a personal care assistant. As part of her employment application, she signed a statement affirming that she was not related to any client or employee of Covenant and provided a copy of her Missouri birth certificate.

6. At the time Miller was hired, Miller received a copy of the Handbook. She signed a statement acknowledging receipt and review of the Handbook.

7. On March 19, 2009, D.S. became a client of Covenant. D.S.’s intake form did not contain any information that may have caused Covenant to suspect she was related to Miller. None of the documents in Miller’s personnel file, including her birth certificate and emergency contact sheet, contained any information that may have caused Covenant to suspect she was related to D.S.

8. Covenant assigned Miller to provide personal care services to D.S. and received Medicaid reimbursements for those services. D.S. did not request that Miller be assigned to her.

9. On May 6, 2009, Miller received the annual training required for her employment as a personal care assistant. In accordance with Covenant’s practice, at this time Miller received another copy of the Handbook and signed another statement acknowledging receipt and review.

10. Sometime in late February or early March 2010, Reagan received a call informing her that an allegation had been made to the Department of Health and Senior Services (“DHSS”) hotline that Miller and D.S. were sisters.

11. Covenant immediately contacted Miller and D.S. about the allegation that they were family members. Miller and D.S. denied the allegation.

⁴ Ex. 3C.

12. Covenant also tried to obtain a copy of D.S.'s birth certificate to compare with Miller's, but was unsuccessful.

13. In March 2010, DHSS began an investigation into the allegation that Miller and D.S. were family members. DHSS investigators were initially unable to confirm the relationship and could not substantiate a violation.

14. On April 9, 2010, D.S. ceased to be Covenant's client and moved to Oklahoma.

15. On May 7, 2010, Miller resigned from Covenant and provided a signed statement that D.S. was the daughter of her father's girlfriend, but that they were not related. Soon after, Miller moved out of the area.

16. On January 5, 2011, DHSS sent a referral letter to the Division notifying the Division that it had obtained a copy of D.S.'s California birth certificate and determined that Miller and D.S. were sisters.

17. Miller and D.S. have the same mother and father and are sisters.

18. Miller and D.S. lied to Covenant about their familial relationship and committed fraud against Covenant and against the state and federal Medicaid programs.

19. On April 11, 2011 the Division issued a decision letter⁵ notifying Covenant that it had conducted a post-payment review of Covenant's MO HealthNet claims, that it had determined that Covenant had been overpaid \$12,770.88 for personal care services provided to D.S. by Miller, and that it was seeking repayment of the full amount.

20. On April 25, 2011 Covenant filed a complaint appealing the Division's decision and requesting a stay.

21. On May 20, 2011 this Commission issued its order granting a stay.

⁵ In the decision letter, as its authority for imposing sanctions, the Division cites 13 CSR 70-3.030(3)(A)7: "Breaching of the terms of the MO HealthNet provider agreement of any current written and published policies and procedures of the MO HealthNet program..." However, the provider agreement is not part of the record, and there is no reference in this letter or in the record to any specific provision that was violated.

Conclusions of Law

We have jurisdiction to hear Covenant's complaint.⁶ We do not merely review the Department's decision, but we find the facts and make an independent decision by applying the existing law to the facts.⁷ We have the same degree of discretion as the Department and need not exercise it the same way.⁸

Covenant has the burden of proof and must prove its case by a preponderance of the credible evidence.⁹ This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness.¹⁰ Our findings of fact reflect our determination of the credibility of witnesses.

Personal care services are provided to Medicaid recipients in their homes as an alternative to institutional care.¹¹ 19 CSR 15-7.021(10) defines basic personal care services as maintenance services provided in a client's home to assist with the activities of daily living, including, but not limited to, meal preparation and assistance with eating, dressing, grooming, bathing, and personal hygiene.

Benefit payments are authorized under section 208.152.1(14), which provides for reimbursement for:

Personal care services which are medically oriented tasks having to do with a person's physical requirements, as opposed to housekeeping requirements, which enable a person to be treated by his physician on an outpatient, rather than on an inpatient or residential basis in a hospital, intermediate care facility, or skilled nursing facility. *Personal care services shall be rendered by an individual not a member of the participant's family who is qualified to provide such services* where the services are prescribed by a

⁶ Sections 208.156.8, RSMo 2000, and 621.055.

⁷ *Geriatric Nursing Facility v. Department of Social Services*, 693 S.W.2d 206, 209 (Mo.App., W.D. 1985).

⁸ *State Board of Registration for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo.App., K.C.D. 1974).

⁹ Section 621.055, *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo.App., W.D. 1992).

¹⁰ *Harrington* 844 S.W.2d at 19.

¹¹ 13 CSR 70-91.010(1); 19 CSR 15-7.021(10).

physician in accordance with a plan of treatment and are supervised by a licensed nurse....

(Emphasis added.)

The Division relies on its Medicaid regulations as support for its position that all payments made to Covenant for personal care for D.S. are overpayments subject to recoupment, because the regulations prohibit family members from providing personal care services for Medicaid reimbursement to other family members. Pursuant to §§ 208.153.1 and 208.201, the Division is authorized to define by rule and regulation the reasonable costs, manner, extent, and quality of medical assistance consistent with the provisions of §§ 208.151 and 208.152.

Section 208.201.6(8) provides:

6. In addition to the powers, duties and functions vested in the MO HealthNet Division by other provisions of this chapter or by other laws of this state, the MO HealthNet Division shall have the power:

* * *

(8) To define, establish and implement the policies and procedures necessary to administer payments to providers under the MO HealthNet program[.]

13 CSR 70-91.010(3)(K)4 provides that an *in-home personal care worker*:

shall meet the following requirements:

* * *

4. *May not be* a family member of the recipient for whom personal care is to be provided. A family member is defined as a parent; sibling; child by blood, adoption or marriage; spouse; grandparent or grandchild.

(Emphasis added.)

Regulation 19 CSR 15-7.021(18)(H) provides that an *in-home service provider*:

shall meet, at a minimum, the following administrative requirements:

(H). *Ensure that no* in-home services worker is a member of the immediate family of the client being served by that worker. An immediate family member is defined as a parent; sibling; child by blood, adoption or marriage; spouse; grandparent or grandchild. (Emphasis added)

Pursuant to § 536.031, the courts of this state shall take judicial notice, without proof of the contents of the code of state regulations. That rule applies to this Commission by virtue of § 536.070(6).

The facts in this case are straightforward and undisputed. The dispute in this case is over the Division's strict interpretation of the regulations and the appropriate sanction when an in-home service provider has done all it reasonably can to ensure that no in-home personal care worker employed by it provides services to a family member.

Covenant does not dispute the fact that Miller should not have provided services to D.S. pursuant to 13 CSR 70-91.010(3)(K)4 or the amount the Division says Covenant received from Medicaid for those services. Covenant's only argument is that because it could not know Miller and D.S. were related and because it made every effort to "ensure" compliance with Medicaid regulations pursuant to 19 CSR 15-7.021(18)(H), it should be subject to a less severe sanction than recoupment.

The Division advocates a strict construction of 13 CSR 70-91.010(3)(K)4 and a zero tolerance policy in favor of recoupment. This posture places a heavy burden on providers without any guidance from the Division of how to ensure compliance with the regulations as required by 19 CSR 15-7.021(18)(H).

Covenant is responsible for knowing and following the law and regulations. The law and the regulations prohibit personal care workers from providing personal care services to family members and require personal care service providers to "ensure" that this requirement is met.

Ensure means “to make sure, certain or safe.”¹² Covenant was aware of the law and regulations and made every effort to make certain that its workers did not provide services to family members. It is difficult to imagine what more Covenant could have done to make certain “that no in-home services worker is a member of the immediate family of the client being served by the worker,” and the Division does not suggest that Covenant should or could have done more. The policies and procedures Covenant had in place were designed to make sure that its workers did not provide services to family members. Covenant required every employee to read and sign the policies and procedures manual that explained the rules when they were hired and once a year for each year they were employed and Covenant required affirmative statements from new employees that they were not related to any clients. Covenant questioned Miller and D.S. after the allegation was made, tried to locate D.S.’s birth certificate to compare with Miller’s, and finally obtained a specific signed statement from Miller denying a family relationship with D.S.

But Covenant’s policies and procedures, as comprehensive as they were, could not make the Medicaid program safe from a worker lying about their relationship to a client. There is no evidence that Covenant could have known Miller and D.S. were family members until DHSS finally obtained a copy of D.S.’s birth certificate ten months after its investigation began, and the Division does not allege that it did. In fact, the Division concedes in its post hearing brief that Covenant did not know, and there was no reason for Covenant to suspect the relationship between Miller and D.S. Miller and D.S. lied to Covenant about their relationship, and in doing so Miller violated 13 CSR 70-91.010(3)(K)4. The two sisters committed fraud on the state and federal Medicaid systems.

Covenant argues that it complied with 19 CSR 15-7.021(18)(H) because, as an in-home service provider, it did everything in its power to make sure that none of its employees provided

¹² *Merriam Webster’s Collegiate Dictionary* 416 (11th ed. 2004).

services to a family member. The Division concedes that “[t]his may have been a good argument if the regulation [Covenant] relied upon ... was a MO HealthNet regulation or if the decision letter sent by the Department had relied upon the ... regulation.” The Division asserts that 19 CSR 15-7.021 is a DHSS regulation, not a MO HealthNet regulation, and therefore is only relevant if DHSS were attempting to terminate Covenant’s Title XIX participation agreement. The Division argues that only the MO HealthNet regulation 13 CSR 70-91.010 is relevant to its action to recoup payments paid under Title XIX. This is a distinction without a difference. 19 CSR 15-7.021 specifically references 13 CSR 70-91.010, 13 CSR 70-91.020 and 13 CSR 70-91 030; and 13 CSR 70-91.010 specifically references 19 CSR 15-7.021(18).

In addition to repayment, possible sanctions include suspension or termination from the program, prior approval of services, bill review prior to payment, and education. 13 CSR 70-91.030(3) enumerates several non-exclusive¹³ factors to take into consideration when determining whether sanctions are warranted and the appropriate severity of those sanctions. These factors include: seriousness of the offense (financial harm, substandard services, inadequate or dangerous medical care); extent of violation (number of patients involved, number of claims involved, length of time violations occurred, amount of overpayment); history of prior violations; prior imposition of sanctions; and prior provision of education. All of these factors weigh in favor of mitigation in this case. The financial harm was not substantial (less than \$13,000 over a 13-month period), and there were no substandard services or dangerous medical care; the violation involved only one patient and one worker; and there is no evidence that Covenant has any prior violations or sanctions. In addition, Covenant did everything in its power to avoid a violation before the allegation was made and to determine the truth after the

¹³ See, *Department of Social Services v. Mellas*, 220 S.W.3d 778, 781 (Mo. App. W.D. 2007) (this Commission has the authority to consider other factors and to mitigate the sanction imposed by the Division.).

allegation was made. Repayment, termination, suspension, prior approval, and prior bill review are all inappropriately harsh sanctions and education in this case would serve no purpose.

Covenant did everything it could to make certain that no employee was a member of the family of a client being served by the worker. Miller and D.S. lied to Covenant about their relationship and intentionally violated the Medicaid regulations and committed fraud. Without permission and certain information from D.S., there was no way for Covenant to have obtained her California birth certificate, which was the only proof that Miller and D.S. were family members. It took DHSS almost ten months to complete its investigation and obtain this proof.

Summary

We find that Covenant did not violate the Medicaid regulations and is not subject to any penalty.

SO ORDERED on June 10, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner